A

Rugayah bt Abd Malik v Dream Wood Design Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO WA-28NCC-388–06 OF 2017
LAU BEE LAN J
4 OCTOBER 2017

C *Companies and Corporations — Winding up — Petition — Petitioner filed winding up petition against respondent pursuant to s 465(1)(e) of the Companies Act 2016 — Whether respondent failed to pay debt within stipulated time — Whether there was evidence of solvency — Whether respondent unable to pay debt — Companies Act 2016 s 465(1)(e)*

D

On 17 May 2017, pursuant to s 465(1)(e) of the Companies Act 2016 ('the Act'), the petitioner had served a statutory demand dated 16 May 2017 to the respondent calling upon the respondent to make payment of RM2,124,563.51 ('the debt') being the amount due and owing to the petitioner as at 16 May 2017 pursuant to a judgment obtained against the respondent. A period of 21 days had lapsed since the said statutory demand was served on the respondent, but the respondent still failed to pay the debt. The petitioner subsequently filed a winding up petition seeking the following reliefs: (a) that the respondent be wound up by the court under the provisions of the Act; (b) that the official receiver be appointed as the liquidator of the company; and (c) that the costs and incidental to the winding up be paid out of the assets of the company.

Held, allowing the petitioner's winding up petition with costs of RM5,000 subject to allocator:

(1) Since the court had found that the statutory notice was proper and good service, the failure of the respondent to pay its debt within 21 days from the date of receipt of the said notice means that the presumption under s 466(1) of the Act was invoked in that the respondent was unable to pay its debt. Further, since there was no evidence of solvency adduced by the respondent, the respondent therefore had failed to rebut the presumption that it unable to pay its debts (see paras 8–9).

[Bahasa Malaysia summary

Pada 17 Mei 2017, berikutan s 465(1)(e) Akta Syarikat 2016 ('Akta'), pempetisyen telah menyerahkan tuntutan statutori bertarikh 16 Mei 2017 kepada responden meminta responden membuat bayaran sebanyak RM2,124,563.51 ('hutang') sebagai jumlah yang kena dibayar dan terhutang kepada pempetisyen pada 16 Mei 2017 berikutan penghakiman yang

diperolehi terhadap responden. Tempoh 21 hari telah berlalu semenjak tuntutan statutori diserahkan ke atas responden, tetapi responden masih gagal untuk membayar hutang. Pempetisyen kemudiannya memfailkan petisyen penggulungan memohon untuk relief berikutan: (a) bahawa responden digulung oleh mahkamah di bawah peruntukan Akta; (b) bahawa pegawai penerima dilantik sebagai penyelesai syarikat; dan (c) bahawa kos dan butiran sampingan kepada penggulungan dibayar daripada aset syarikat.

Diputuskan, membenarkan petisyen penggulungan pempetisyen dengan kos sebanyak RM5,000 tertakluk kepada alukator:

(1) Memandangkan mahkamah mendapati bahawa notis statutori adalah betul dan penyerahan baik, kegagalan responden untuk membayar hutangnya dalam masa 21 hari dari tarikh resit notis tersebut bermaksud bahawa anggapan di bawah s 466(1) Akta dibangkitkan di mana responden tidak dapat membayar hutangnya. Selanjutnya, memandangkan tidak terdapat keterangan kesolvenan dikemukakan oleh responden, responden oleh itu gagal untuk mematahkan anggapan bahawa ia tidak dapat membayar hutangnya (lihat perenggan 8–9).]

Notes

For cases on petiton, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1709–1878.

Cases referred to

Bank Utama (M) Bhd v GKM Amal Bhd [2000] 5 MLJ 657, HC (folld)
Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (folld)

Legislation referred to

Companies Act 2016 ss 465(1)(e), 466(1)

Foo Wen Cong (Guok Partnership) for the petitioner.
Muhammad Zaim Azfar bin Jalaludin (Zaim & Co) for the respondent.

Lau Bee Lan J:

[1] Vide a winding up petition dated 29 June 2017 (encl 1) ('the winding up petition') made pursuant to s 465(1)(e) of the Companies Act 2016 ('the CA 2016') the petitioner seeks for substantially the following reliefs:

(a) that Dream Wood Design Sdn Bhd be wound up by court under the provisions of the CA 2016;

(b) that the official receiver be appointed as the liquidator of the company; and

(c) that the costs and incidental to the winding-up be paid out of the assets of the company.

[2] The court has considered the written cum oral submission of the parties. The court's findings include the following.

[3] The statutory notice issued by the petitioner pursuant to s 465(1)(e) of the Companies Act 2016 is based on a judgment obtained after full trial against the respondent and one Gagasan Eksklusif Sdn Bhd in KLHC Suit No 22NCC-361–11 of 2015 dated 13 February 2017 for the sum of:

(a) RM1,969,229.17 together with 5% interest calculated annually from 16 December 2015 until the date of full and final settlement, to be paid to the petitioner; and

(b) costs of RM15,000 together with allocator fees (RM600) to be paid to the petitioner ('the judgment').

[4] The respondent had filed an appeal to the Court of Appeal vide Civil Appeal No W-02(NCC)-468–03 of 2017 and the said appeal is currently pending.

[5] On 17 May 2017, pursuant to s 465(1)(e) of the CA 2016, the petitioner through her solicitors, Messrs Guok Partnership, served a statutory demand dated 16 May 2017 on the respondent at its registered address, calling upon the respondent to make payment of RM2,124,563.51 ('the debt') being the amount due and owing to the petitioner as at 16 May 2017 pursuant to the judgment.

[6] A period of 21 days has lapsed since the said statutory demand was served on the respondent but the respondent has failed and/or neglected to satisfy the said sum or any part thereof or to make any offer to the petitioner to secure or to compound thereto.

[7] Essentially the respondent opposes the petition alleging that there are still arrears of payment to be paid by the Government of Malaysia in relation to the subject matter of the judgment. I agree with learned counsel for the petitioner that the aforesaid issue is irrelevant in this winding up proceeding and it should have been raised and contested during the trial. The winding up court is not the proper forum to decide on the validity of the respondent's claim when final judgment has been procured by the petitioner. I am of the view the respondent has not established that the debt is bona fide disputed. I agree with the view expressed by the learned judge in *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657 at held (2):

A disputed debt in the context of a winding-up petition is a debt in respect of which it is shown, with grounds supported by evidence, that there is a bona fide dispute ... The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is bona fide disputed.

[8] Since I find that the service of the statutory notice is proper and good service, the failure of the respondent to pay its debt within 21 days from the date of receipt of the said notice means the presumption under s 466(1) of the CA 2016 is invoked in that the respondent is unable to pay its debt. Following the Court of Appeal case of *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 at p 41 para [11]: 'This presumption is, however, rebuttable. The onus shifts onto the company to show that it is able to pay the debt'.

[9] I find the respondent did not canvas the issue of commercial solvency or inability to pay its debt in its affidavit in opposition. The respondent is precluded from raising it now. Since there is no evidence of solvency adduced by the respondent, in my judgment the respondent has failed to rebut the presumption that it unable to pay its debts.

[10] In the circumstances I accordingly allow in respect of the petitioner's winding-up petition, OIT of prayers (i), (ii) and (iii) and costs of RM5,000 (subject to allocatur) to be paid by the liquidator out of the assets of Dream Wood Design Sdn Bhd to the petitioner.

Petitioner's winding up petition allowed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar